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No. 99-1939

In the Supreme Court of the United States

OCTOBER TERM, 2000

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

LUKE AIR FORCE BASE, ARIZONA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Respondent Luke AFB argues that the decision of the court of appeals does not warrant review by this Court. In support of this assertion, Luke AFB claims that there is no disagreement among the courts of appeals and that, in any event, the decision of the court below is correct. Neither of these assertions has merit.

I. The Decision of the Court Below Directly Conflicts with Those of the District of Columbia and Tenth Circuits

Contrary to Luke AFB's assertion (Brief for the Respondent in Opposition (Opp.) 12), the courts are in conflict on the basic question that prompts this case. Two courts of appeals — the D.C. and Tenth Circuits — have found that the term "grievance," as used in section 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101–7135 (1994 & Supp. IV 1998) (Statute), means "any complaint," to include

matters pursued through alternative statutory procedures. These findings are consistent with the Statute's broad definition of grievance found in section 7103(a)(9). The Ninth Circuit, on the other hand, has twice narrowly construed the statutory definition in holding that the term "grievance" refers only to complaints that are processed through a negotiated grievance procedure (NGP).

The D.C. Circuit expressly recognized that its holding conflicted with that of the Ninth Circuit's *IRS, Fresno* v. *FLRA*, 706 F.2d 1019 (9th Cir. 1983) decision. *See NTEU* v. *FLRA*, 774 F.2d 1181, 1188 (D.C. Cir. 1985). Stating that it "must *disagree*" with the Ninth Circuit's construction of grievance, the D.C. Circuit asserted that the "language and structure of the statute lead us to a *different result*" than that reached by the Ninth Circuit. *Id.* (emphasis added). The emphasized words express conflict, not agreement.[1]

The circuits are also in direct conflict with regard to the union's interest in being represented at formal discussions concerning grievances pursued through alternative statutory procedures. *See* Pet. 12, 18–19. Again, the D.C Circuit expressly recognized this conflict, stating that it must "disagree" with the Ninth Circuit's view of the union's institutional interests. *NTEU* v. *FLRA*, 774 F.2d at 1188. Luke AFB has not questioned the courts' significant disagreement over the role of unions in the federal workplace, but has merely

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[1]The Ninth Circuit itself has expressed doubts about its reasoning in *IRS, Fresno* v. *FLRA* and suggested that it agrees with the D.C. Circuit. *VA, Long Beach* v. *FLRA*, 16 F.3d 1526, 1534 n.4 (9th Cir. 1994). Luke AFB suggests (Opp. 14) that any intra-circuit conflict is better resolved by the Ninth Circuit and not this Court. However, the Ninth Circuit declined the Authority's invitation to hear the instant case en banc. *See* Authority's Petition (Pet.) Appendix B.

sided with the Ninth Circuit by concluding that the "union's interest in the outcome of EEO proceedings, however, is limited." Opp. 15. The D.C. Circuit takes a different view, positing that the union's interest in how the employer processes "complaints challenging alleged discrimination" is "far broader." *NTEU* v. *FLRA*, 774 F.2d at 1188.

Luke AFB attempts to reconcile the cases by arguing that the alternative statutory procedures involved — those of the MSPB and the EEOC — are different. This argument is unavailing. First, as explained above, the D.C. Circuit in *NTEU* v. *FLRA* (which involved an MSPB proceeding) viewed its decision as conflicting with — not being distinguishable from — *IRS, Fresno* v. *FLRA* (which involved an EEOC proceeding). Though the Tenth Circuit in *VA, Denver* v. *FLRA*, 3 F.3d 1386, 1391 (10th Cir. 1993) distinguished its decision from *IRS, Fresno* v. *FLRA*, it did not suggest that section 7114(a)(2)(A) applies to alternative statutory procedures pursued through the MSPB and not the EEOC. Therefore, it is myopic to assert (Opp. 12) that "[o]nly the Ninth Circuit has directly confronted the issue of whether the union's right of representation applies to EEO proceedings."

Second, with regard to the meaning of "grievance" in section 7114(a)(2)(A) of the Statute, there is no relevant difference between MSPB procedures and EEOC procedures. *See* Pet. 13 n.5. That section refers to "*any* grievance" which in turn is defined in section 7103(a)(9) as "*any* complaint." Luke AFB has not — and cannot — point to anything in the Statute to explain why "any complaint" includes MSPB procedures, but excludes EEOC procedures.

Third, Luke AFB's arguments regarding EEOC procedures apply equally to MSPB procedures. Luke

AFB argues (Opp. 15) that EEOC procedures are established by the EEO statute and accompanying regulations; MSPB procedures are likewise established by the MSPB statute (5 U.S.C. 7701–7703 (1994 & Supp. IV 1998)) and accompanying regulations (5 C.F.R. pt. 1201 (1997)). Luke AFB asserts (Opp. 11) that section 7121(d) preserves an employee's right to pursue EEO complaints through the alternative statutory procedure; the same option is preserved in that section for the pursuit of MSPB appeals. Luke AFB claims (Opp. 15) that the union's interest in the outcome of EEO proceedings is limited; however, Luke AFB does not explain, and indeed no explanation is apparent, why the union's interest in MSPB proceedings would not be similarly limited. Finally, in this regard, Luke AFB argues (Opp. 16 & n.5) that EEO complaints may raise privacy and confidentiality issues; but discrimination matters, and thus the same type of issues, may be raised in mixed-case appeals to the MSPB. *See* 5 U.S.C. 7702.

Fourth, Luke AFB incorrectly attributes significance (Opp. 14) to the fact that the Authority and the MSPB were established as a result of the Civil Service Reform Act of 1978 and the EEOC was not. However, in creating the MSPB and the Authority, Congress expressly contemplated that these new agencies would interact with the EEOC. *See* 5 U.S.C. 7702; 5 U.S.C. 7121(d). As pertinent to section 7114(a)(2)(A) — which provides for union attendance at formal discussions concerning grievances — all three agencies address employees' work-related complaints.

In sum, the courts are in conflict over whether the Statute's formal discussion right applies when employees pursue claims through alternative statutory procedures rather than through NGPs. Luke AFB's attempt to confine the issue in this case to the EEO

context (Opp. (I), 15), and thus ignore the D.C. and Tenth Circuits' broader reading of the formal discussion right, hinges on there being a relevant distinction between MSPB and EEOC procedures. However, as shown above, there is no principled way to distinguish these two alterative statutory procedures and thus the issue in this case is ripe for the Court's review.

II. The Term "Grievance" As Used in Section 7114(a)(2)(A) and Defined in Section 7103(a)(9) Properly Includes EEOC Complaints

In addition to attempting to minimize the current split in the courts of appeals, Luke AFB suggests an interpretation of the Statute at variance with the plain language of sections 7114(a)(2)(A) and 7103(a)(9). Prior to analyzing Luke AFB's interpretation of the Statute, it is important to bear in mind that it is the Authority — not Luke AFB, the Ninth Circuit, or the EEOC (Opp. 16 n.4) — that is charged with, and accorded substantial deference in, administering and interpreting the Statute and its terms. *See National Fed'n of Fed. Employees & FLRA* v. *Department of Interior*, 526 U.S. 86, 99 (1999).

Luke AFB argues that discrimination complaints pursued through EEOC procedures are not "grievances" as the term is used in section 7114(a)(2)(A). Although acknowledging the Statute's broad and inclusive definition of grievance, Luke AFB nonetheless contends that "that definition does not extend to EEO complaints." Opp. 8. Luke AFB's position is thus not only inconsistent with the plain language of section 7103(a)(9), but finds no support in other sections of the Statute, the Statute's legislative history, or other laws.

Luke AFB principally relies on section 7121 of the Statute in support of its assertion that EEO complaints

are not grievances.[2] Such reliance is unavailing. First, as demonstrated in the petition (Pet. 16-18), section 7121 does not narrow the statutory definition of grievance, but instead provides a particular procedure for the resolution of "grievances." *See NTEU* v. *FLRA*, 774 F.2d at 1187–88.

Second, the "grievances" referred to in section 7114 must be broader than the grievances that are processed through the NGP pursuant to section 7121. Union presence is already assured throughout the NGP, pursuant to section 7121(b)(1)(C)(i) and (ii). If, as Luke AFB argues, the right to attend formal discussions concerning "grievances" were limited to grievances processed through the NGP, then the formal discussion right set out in section 7114 would merely duplicate the rights provided in section 7121(b)(1)(C). Such a reading would render that portion of section 7114(a)(2)(A) superfluous. *See Kawaauhau* v. *Geiger*, 523 U.S. 57, 63 (1998) (Court hesitant to adopt interpretation of statute that renders superfluous portion of same law).

Nor does the legislative history support Luke AFB's narrower reading (Opp. 9) of the term "grievance" in section 7114. Relying on a passage in the House Report concerning section 7103(a)(9), Luke AFB notes the "'virtually all-inclusive'" definition of grievance, but also states that "'section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term.'" Opp. 9 (quoting H.R. Rep. No. 1403, 95th Cong., 2d Sess. 40 (1978)). This passage, however, provides no support

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[2]Although Luke AFB relies on section 7121, the Ninth Circuit does not do so. In *IRS, Fresno* v. *FLRA*, the Ninth Circuit simply states, without reference to specific statutory language, that EEO complaints are "discrete and separate from the grievance process to which 5 U.S.C. §§ 7103 and 7114 are directed." 706 F.2d at 1024.

for the proposition that EEO complaints are not grievances within the scope of section 7114(a)(2)(A). First, and as noted in the petition (Pet. 18), although the passage indicates that section 7121 excludes *some grievances* from coverage under the NGP, the term "grievance" is not limited to matters covered under the NGP. *See NTEU* v. *FLRA*, 774 F.2d at 1188. Second, to the extent the passage supports a narrowed "effect" of the term "grievance," it does so with respect only to the NGP in section 7121, not regarding the formal discussion right provided for by section 7114.

Similarly unpersuasive are Luke AFB's arguments that EEOC confidentiality safeguards and the Privacy Act (Opp. 15–16) are *per se* legal impediments to the union's right to attend EEO proceedings. Even Luke AFB does not assert that such issues will arise in every case; indeed, none are present here. Rather than adopting a rule uniformly prohibiting union attendance at such sessions, the better course is to permit the Authority, as it has in other cases,[3] to balance individual and institutional interests when and if such issues arise. In short, Luke AFB's confidentiality arguments cannot support a non-literal construction of section 7114 (a)(2)(A) that the Authority has refused to adopt. *Cf. NASA* v. *FLRA*, 527 U.S. 229, 243–44 (1999) ("confidentiality concerns are not weighty enough to

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[3]*See U.S. Dep't of Justice, Bureau of Prisons, Fed. Correctional Inst. (Ray Brook, NY)*, 29 FLRA 584, 590 (1987) (recognizing that the Authority must consider and resolve direct conflicts between rights under section 7114(a)(2)(A) and those under other statutory appeal procedures), *aff'd sub nom. American Fed'n of Gov't Employees, Local 3882* v. *FLRA*, 865 F.2d 1283 (D.C. Cir. 1989); *Federal Aviation Admin., New York, TRACON*, 51 FLRA 115, 123 (1995) (recognizing an individual's privacy interest in an EEO settlement agreement as a basis for rejecting a union's information request under section 7114(b)(4)).

justify a nontextual construction of § 7114(a)(2)(B) rejected by the Authority").

Finally, Luke AFB has pointed to nothing in the EEO laws that is inconsistent with union representation during EEOC proceedings. Therefore, contrary to Luke AFB's assertion (Opp. 12), there was no need for Congress to "amend" Title VII of the Civil Rights Act to specifically permit union representation at section 7114(a)(2)(A) sessions involving EEOC proceedings, just as there was no need for Congress to amend the Inspector General Act to specifically permit union representation at section 7114(a)(2)(B) sessions involving Inspector General personnel, *see NASA* v. *FLRA*, 527 U.S. 229 (1999). In both instances, the Statute generally provides for — and nothing in any other law precludes — union presence.

CONCLUSION

The petition for a writ of certiorari should be granted.[4]

Respectfully submitted,

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[4]The Solicitor General authorizes the filing of this Reply Memorandum by the Federal Labor Relations Authority.